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Summary record of the 2614th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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that subject might be better placed in Part Two bis, on the implementation of State responsibility.

59. While the division of the current draft into Part Two and Part Two bis was an excellent idea, it nonetheless called for some comment. He was not enamoured of the title of Part Two, "Legal consequences of an internationally wrongful act of a State", as it applied equally well to Part Two bis. "The implementation of State responsibility" (Part Two bis), including possible recourse to countermeasures, was also a legal consequence of an internationally wrongful act. Perhaps an enumerative title like "Reparation and obligation of performance" might be preferable for Part Two.

60. Part Two bis ought to have contained articles on diplomatic protection, an issue central to the implementation of State responsibility where injury was caused to a person other than a subject of international law, but since diplomatic protection was being treated as a separate topic, there could be no question of re-including it in Part Two bis. Nevertheless, he strongly urged the Special Rapporteur to think about proposing a draft "without prejudice" provision referring to diplomatic protection. The natural place for that clause would be in chapter I of Part Two bis.

The meeting rose at 1 p.m.

2614th MEETING

Wednesday, 3 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN extended a warm welcome to Mr. Idris, who had been newly elected as a member of the Commission, and invited the members of the Commission to continue their consideration of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. IDRIS thanked the Chairman and said that, owing to the spectacular development of information technologies and world trade, the Commission's role in the codification and progressive development of international law was more important than ever before.

3. In recent years, the Commission had studied important topics such as the establishment of an international criminal court, the draft Code of Crimes against the Peace and Security of Mankind, jurisdictional immunities of States and their property and State responsibility. It had also made tangible progress on reservations to treaties, unilateral acts of States, prevention of transboundary damage and diplomatic protection. He intended to participate actively in the Commission's work in all fields of international law and believed it should tackle new topics, such as information technologies.

4. Mr. PELLET, replying to comments by two members of the Commission who thought that the term *préjudice* was better than the term *dommage*, said that, in international law, the two terms were synonymous.

5. Continuing with his comments (2613th meeting) on the third report of the Special Rapporteur, he said that, as it stood, Part Two of the draft articles was a failure compared with Part One, which was undeniably a success. The Special Rapporteur recognized that Part Two needed to be fully revised. In paragraph 8 of his report, the Special Rapporteur had stated that Part Two had been formulated on the basis of detailed and careful reports of the previous Special Rapporteur. He himself did not share that view. The previous Special Rapporteur, Mr. Gaetano Arangio-Ruiz, had greatly neglected the technical aspects of reparation and he earnestly hoped that, particularly in chapter II of Part Two, the current Special Rapporteur would propose much more specific and detailed articles on the forms and modalities of reparation, including its purpose, particularly compensation for *lucrum cessans*, and the means of calculating the amount and possible interest payments, on which the draft as it stood said nothing. States needed to know when they had to make interest payments and required general guidelines for calculating them. The more detailed provisions which the Special Rapporteur undertook to provide in paragraph 19 of the report would therefore be welcome.

6. With regard to reparation in cases of a plurality, not of injured States, an issue dealt with in article 40, but of authors of an internationally wrongful act, as covered in paragraphs 31 to 37 of the report, he had identified a number of weaknesses. Paragraph 37 stated that the case where concurrent acts of several States together caused injury was dealt with in further detail below; but it was not; the problem was not analysed further on in the report. He therefore hoped that the Special Rapporteur would take up the major issue of joint and several responsibility in international law. That was a very important and real

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

problem, as demonstrated by the cases heard by ICJ, such as the *East Timor* case and the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In a draft on State responsibility, it was essential that the articles themselves should clearly answer the question whether there was a distinction in international law between joint responsibility and several responsibility.

7. In his view, the Special Rapporteur referred incorrectly in paragraphs 39, 50 and 53 of the report to a "secondary" obligation or consequence. It would be better to refer to a "derived" obligation or consequence. The entire law of responsibility was made up of secondary norms and the rules applicable to responsibility were, by extension, secondary. However, it served no purpose to say that the consequences of a breach were secondary; they flowed—or were derived—from secondary norms. For the sake of clarity, terms that complicated matters unnecessarily should not be used in the commentaries to articles.

8. Turning to the draft articles proposed by the Special Rapporteur, he said that he had no problem with article 36, but, as he had noted the day before, the issues dealt with in Part Two bis were also among the consequences of an internationally wrongful act, with the possible exception of countermeasures, which were the consequence of the absence of reparation, non-cessation or the non-performance of an obligation. In a way, they were derived consequences. On the other hand, the possibility of invoking responsibility provided for in chapters I and III of Part Two bis was very definitely one of the consequences of an internationally wrongful act. The problem with the title of Part Two bis to which he had drawn attention was thus also to be found in the drafting of article 36.

9. Article 36 bis was very well presented in paragraph 50 and he found it satisfactory, particularly for the reason stated in paragraph 50 (*c*): a State must not be able to "buy back" a wrongful act or conduct contrary to international law.

10. He was somewhat sceptical, however, about the general obligation to provide assurances and guarantees of non-repetition. It was very difficult to express such an abstract idea. He did not object to that provision, but it had very little basis in international law and he suspected that it was not realistic. In any event, if the Commission decided to retain article 36 bis, paragraph 2 (*b*), it would have to specify the cases in which that so-called obligation actually existed.

11. Article 37 bis appeared to be excellent, provided that "the following articles" to which it referred clearly indicated the cases in which reparation was payable jointly or severally. The problem of joint or several responsibility should be dealt with in the articles and not just in the commentaries.

12. He was less sceptical than the Special Rapporteur about the usefulness of article 38. As shown by paragraphs 60, 61 and 65 of the report, general consequences were not absent from the draft, but article 38 did not state that it was the general consequences not provided for by the draft articles that continued to be governed by custom. It said that customary rules continued to be applicable in situations that were not covered by the draft articles. In any draft, it was reasonable to refer to custom in order to show clearly that the draft was not in any event only of a residual nature. He therefore considered that the article should be retained, all the more so as Part Two had so many shortcomings. He hoped that the Special Rapporteur would do everything possible to remedy those shortcomings, but he doubted that he would succeed in codifying everything and covering every circumstance. Article 38 should therefore be retained. Like the Special Rapporteur, however, he thought that it should be placed in the part on general provisions, because the principle it embodied applied to the draft as a whole.

13. Mr. CRAWFORD (Special Rapporteur) requested the members of the Commission to limit their comments to the first four articles, as Mr. Pellet had done. Once the debate on those articles had been completed, they could then be referred to the Drafting Committee.

14. Mr. BROWNLIE said that, since the subject was an extremely difficult one, the Special Rapporteur's work was of great assistance in that it helped to establish parameters and to see what the problems were. He supported the Special Rapporteur's proposals on the placement of articles and the need for a Part Four.

15. He had some general concerns, however, about the current state of the work on Part Two of the draft articles on State responsibility. It seemed to him, both from the doctrinal point of view and in terms of how the law worked, that the content of principles relating to remedies—compensation, restitution, remoteness of damage—was necessarily determined by primary rules. The Commission therefore had to take great care with how the articles were formulated. He was suggesting not that it was necessary to stay away from the subject of remedies, but rather, that the Commission must be careful not to formulate what appeared to be general rules when in fact it was only listing optional remedies. Unlike Mr. Pellet, he thought the Commission must avoid over-elaborating on the topic. In the context of reparation as a general topic, he thought that restitution was clearly not a general consequence of a wrongful act. It was an optional remedy whose applicability depended on the particular context, which itself was determined by primary rules. By way of illustration, he referred to the legality or otherwise of confiscation or expropriation of foreign property by a State. Expropriation could be illegal only *sub modo*. For example, expropriation for a public purpose, which was prima facie lawful, became unlawful if appropriate compensation was not provided. Expropriation could also be illegal per se—for example, if it was carried out on what were clearly racial grounds or if it was in breach of some fundamental principle of human rights. In such cases, the absence of compensation was simply an aggravation of the illegality, not a condition for it. It was probable that restitution would apply to the second category as a remedy, but not to the first. There were other contexts in which it was perfectly clear that the "geography of primary rules", i.e. the precise legal context, would determine whether compensation or restitution was the appropriate remedy. The Commission could not possibly make a catalogue of cases where restitution would be appropriate and compensation would not be. The drafting of article 37 bis might have to be analysed to see whether it implied that restitution was a generally applicable rem-

edy. The commentary, if necessary, should provide the required clarification.

16. One question directly related to the general problem of reparation dealt with in article 37 bis was that of the cessation of the wrongful act, dealt with in article 41 adopted on first reading. The Special Rapporteur rightly pointed out in paragraph 50 of his report that the cessation of a continuing wrongful act could be seen as a function of the obligation to comply with the primary norm. On that view, it was not a secondary consequence of a breach of an international obligation and it had no place in the draft articles. Nonetheless, the Special Rapporteur then made a good pragmatic case for including cessation in Part Two of the draft. Unfortunately, that did not resolve the analytical problem, i.e. apart from the exclusively judicial sphere in which "cessation" could be called for by a court by way of an injunction (as in the case concerning *Military and Paramilitary Activities in and against Nicaragua*), the concept could be linked in general international law to the "consequences of an internationally wrongful act" only by means of a somewhat artificial construct. Consequently, the text should at least avoid any reference to "cessation of a continuing wrongful act". Not only was the concept of a continuing wrongful act in itself difficult to pinpoint and use, but the obligation of cessation also applied when there was a series of instantaneous acts.

17. The question of reparation was also related to that of a causal link and the intention underlying the wrongful act. Clearly, a State committing the violation could not incur the same degree of responsibility for a wrongful act that was intentional as for one that resulted from pure negligence. But, once again, that directly concerned the area of primary rules and so-called "universal" assertions should be avoided.

18. Lastly, with regard to appropriate assurances and guarantees of non-repetition, which the Special Rapporteur dealt with in paragraphs 53 to 59 of his report, he would like to know what their actual place was in the current State practice. They seemed directly inherited from nineteenth-century diplomacy. Even if they were accepted in principle, today their appropriateness and applicability varied greatly with the particular legal context. That did not mean that those questions should not be touched on in the framework of reparation, but the relevant provisions had to be worded in very flexible and general terms.

19. Mr. SIMMA said that the Commission should not rush through the adoption of unsatisfactory texts merely in order to complete the consideration of the second reading of the draft articles by its fifty-third session, in 2001. The draft articles of Part Two adopted on first reading had not been considered with anywhere near the same care as those of Part One. In particular, the question of the violation of multilateral obligations should be the subject of an in-depth discussion. The drafting of the commentary was still in the embryonic stage. It would certainly be preferable to extend the completion of the draft articles in a truly satisfactory manner into the new quinquennium than to repeat what had happened at first reading. If the Commission wanted to finish its work at the next session, it would have to come up with a complete draft by August because the fifty-fifth session of the General Assembly would be the last opportunity for the Commission to obtain feedback from the Sixth Committee on a great number of vital questions still in abeyance, such as multilateral injury, countermeasures and dispute settlement. These issues were too important to be waved through. In the introduction of his report, the Special Rapporteur had again noted the correspondence between the draft articles of Part Two and those of Part One, which set out general secondary rules on State responsibility, and he had spoken of "reflexive" articles. But although that correspondence was real and the two sets of articles were counterparts, it was important to avoid conclusions that might prove premature. For instance, if the Commission decided to include the *exceptio inadimpleti contractus* in the draft—something the Commission should, in his view, refrain from doing—the "reflexive" character of the rules might lead to the possibility for States to reciprocally emancipate each other from these rules altogether.

20. With regard to methods, he agreed with Mr. Pellet on the desirability of re-examining the approach of having a Part Two and a Part Two bis. As to the articles themselves and the new wording proposed by the Special Rapporteur, he had no objection to article 36 or to the deletion of article 42, paragraph 3, although the issue should no doubt eventually be reconsidered in connection with countermeasures. The problem of the proportionality of countermeasures or the limitations which respect for human rights imposed on countermeasures would inevitably require a more in-depth discussion. He was thinking in particular of the consequences for the Iraqi population of the sanctions imposed on Iraq by the Security Council.

21. He agreed with the Special Rapporteur's suggestion that cessation should be placed in a *chapeau* and that that concept should be linked with appropriate assurances and guarantees of non-repetition. Unlike Mr. Pellet and Mr. Brownlie, who had questioned the desirability of including appropriate assurances and guarantees of non-repetition in the draft, he thought that they had their place in a judicial context and he referred the Special Rapporteur to the WTO Panel's decision on Section 301 of the United States Trade Act of 1974.[3] If the legislation of a State allowed repeated violations of international law, it made sense for an international court to grant a guarantee of non-repetition. He agreed that the wording "where appropriate" might be too loose, leaving loopholes particularly in favour of references to internal law. One solution, as proposed in the Sixth Committee by the Czech Republic, would be to replace the words "where appropriate" in article 46 by the words "if the circumstances so require".

22. The problem posed by article 38 regarding the application of customary international law might be solved in two ways: the general tenor of the article could be retained, provided that reference was made not only to the provisions of Part Two, but also to those of Part One of the draft articles on State responsibility. Moreover, article 38 would be better placed in the preamble, as had been done with other conventions. Unlike the Special Rapporteur, he did not think it needless to add a saving clause, which might be modelled, for example, on article 73 of the 1969 Vienna Convention.

[3] See WTO, report of the Panel on *United States—Sections 301–310 of the Trade Act of 1974* (document WT/DS152/R of 22 December 1999); reproduced in ILM, vol. XXXIX (March 2000), p. 452.

23. Notwithstanding the Chairman's recommendation that article 40 should be put aside for the time being, he wanted to make several introductory comments on that provision for fear of not having the opportunity to return to it later. Article 40 concerned the entitlement to invoke the consequences of State responsibility. As a preliminary comment, he had considerable difficulties with the Special Rapporteur's piecemeal approach to the topic at hand, because it was very difficult to consider the subject matter of article 40 adequately without knowing how the Special Rapporteur would take the multilateralization of injury into consideration in his treatment of the range of remedies and, particularly, with regard to countermeasures. In table 2, in paragraph 116 of the third report, the Special Rapporteur provided an outline, but clearly all the problems had not been resolved. For example, in the last item in that table, it was stated that under certain conditions countermeasures could be adopted by agreement between all States. He challenged the members of the Commission to come up with a single example where all States in the world would agree on sanctions or countermeasures following a breach of an obligation *erga omnes*. Again, according to that item, in case of well-attested gross breaches, all States were to be entitled to resort to countermeasures. The phrase used by the Special Rapporteur reminded one of the magic formula of resolution 1503 (XLVIII) of 27 May 1970 of the Economic and Social Council—an unfortunate precedent in a way, because this procedure had turned out so cumbersome and politically charged that it almost amounted to a fraud.

24. He said the contours of the new regime replacing draft article 19 were satisfactory but again, until the current time only contours were visible and the concepts of *jus cogens* and obligations *erga omnes* had, to use a metaphor coined by Mr Brownlie, remained pretty much in the garage. In this context he could not but regard it as an element of retributory justice that the Special Rapporteur, who, with reference to the *East Timor* case, had tried to lock the garage door, as it were, saw himself confronted with the task of defending those concepts and implementing them in the context of State responsibility.

25. The vagueness of the concepts of *jus cogens* and obligations *erga omnes* might be tolerable in the law of treaties, where their consequences were isolated and where some procedural safeguards had been provided. Indeed, that was why the car had hitherto remained in the garage. However, State responsibility was a much more dangerous vehicle and, in a way, the moment of truth for those notions. Again, as far as he was concerned, he agreed with the general direction of the report; the Special Rapporteur appeared to steer clear of the Charybdis of positing multilateral responsibility as one vis-à-vis an "international community" that had no Claimant status, and the Scylla of too generously handing out entitlements to everybody, irrespective of closeness to breaches of international law.

26. Draft article 40 constituted the gate to this difficult terrain. As the Special Rapporteur had had scathing criticism for article 40 as adopted on first reading, he in turn thought that he could be a little critical of the Special Rapporteur's article 40 bis. The new draft article had several flaws. The first was structural. Not only did the title "Right of a State to invoke the responsibility of another State" not really correspond to the content of the article, but there was no logical link between the first two paragraphs, which dealt successively with the definition of the "injured State" and with the conditions under which a State had a "legal interest" in the performance of an international obligation to which it was a party. But the concepts of a State being injured and a State having a legal interest did not really belong together. They belonged to different categories. The notion of "legal interest" had to be understood in a broader sense than had the Special Rapporteur: an interest was protected by law and was thus turned into a right. Thus, his interpretation of the judgment of ICJ in the *Barcelona Traction* case differed substantially from that of the Special Rapporteur. There was nothing on page 32 (para. 97) of that judgment that rendered the Special Rapporteur's reading the cogent one.

27. He wanted to conclude his comment on draft article 40 with a constructive proposal. Why not cut the Gordian knot and get rid of the notion of "injury" as the legal trigger to invoking State responsibility altogether? In his view, the notion of "injury" as such a trigger had become as useless and meaningless as the concept of "damage". The broadening of "damage" to "legal damage" had been coupled to a respective broadening of "injury" to a point where everybody was injured somehow through every violation of international law—and thus lead *ad absurdum*. He therefore suggested that the Special Rapporteur's proposed title of article 40 bis should be retained but that the introductory words of paragraph 1 should be replaced by the following: "For the purposes of these draft articles, a State has the right to invoke the responsibility of another State if . . .". Paragraph 1, subparagraphs (*a*) and (*b*), could then be adopted as proposed by the Special Rapporteur.

28. Paragraph 2 might begin with the following words: "In addition, for the purposes of these draft articles, a State may invoke certain consequences of internationally wrongful acts in accordance with the following articles", after which paragraph 2, subparagraphs (*a*) and (*b*), as proposed by the Special Rapporteur could follow.

29. The text of article 41 might be amended accordingly. He said he would submit a written version of his proposal for discussion at the next meeting on the topic.

30. Mr. BROWNLIE, speaking on a point of order, said that Mr. Pellet and he had obeyed the Chairman's injunction not to touch on article 40, although they both had extensive views on it. As Mr. Simma had disregarded that recommendation, he asked the Chairman either to open the discussion on article 40 or to reiterate more firmly his recommendation not to comment on it for the time being.

31. Mr. CRAWFORD (Special Rapporteur) noted that there had never been a substantive discussion on article 40.

32. The CHAIRMAN said that the members of the Commission would have the opportunity to have a thorough discussion of article 40 in due course; he asked them to confine themselves for the time being to articles 36, 36 bis, 37 bis and 38.

33. Mr. GAJA congratulated the Special Rapporteur on his impressive third report, which he largely endorsed,

particularly with regard to the proposed reorganization of the contents of a new draft. He endorsed the Special Rapporteur's proposal that the perspective of the State incurring responsibility rather than that of the injured State should be adopted for Part Two, as had been done for Part One. However, the draft articles should go further and consider all cases in which the State was responsible, not only those in which the responsibility of a State arose towards other States. In view of its workload, the Commission might be tempted to confine itself to that particular case. But if one took the Special Rapporteur's view that infringements of human rights or of the principle of self-determination injured not only States, but also individuals, or peoples, the situation of the latter could hardly be ignored in the draft articles. That affected the very obligations the responsible State had to fulfil as a consequence of the internationally wrongful act. Thus, for example, if an individual whose human rights had been infringed requested compensation rather than restitution, States should be precluded from insisting on restitution. In describing consequences of internationally wrongful acts, account would inevitably have to be taken of the position of all those who, under international law, had been injured, whether States, international organizations, other entities or individuals. It was not necessary to define more precisely when an individual or an entity other than a State had been injured. That was a question of primary norms which need not be resolved in detail in the draft articles.

34. With regard to article 36 bis, he tended to agree with the imaginative proposal that assurances and guarantees of non-repetition should be grouped with cessation. The Special Rapporteur suggested that, in order to establish when assurances and guarantees were required, the Commission should go beyond the text adopted on first reading, and also that the nature of the obligation infringed was of special relevance. That suggestion had been taken up by Mr. Pellet and could also be found in an observation by the Czech Republic.[4] In some cases, assurances of that type might not be needed because there was no risk of a repetition, while, on the contrary, a risk might exist for wrongful acts of less importance. For example, in the case of a Government that had committed an act of genocide and that was still in power, it might reasonably be assumed that there was a serious risk that acts of genocide would be repeated. That would be a good reason for insisting on assurances or guarantees of non-repetition. But it might also be the case that the same Government had been replaced by another that had a very good human rights record. The State would then still have committed the wrongful act, but there would be no point in requesting guarantees of non-repetition once the risk had disappeared. On the other hand, a serious risk of repetition could exist for minor infringements. A link might be established in the text between assurances or guarantees of non-repetition and the seriousness of the risk of repetition, illustrating the point in the commentary by quoting the example given by Mr. Simma concerning a law that remained in force after the wrongful act stemming from the application thereof had been committed. If there was a risk of that legislation being applied again and giving rise to a wrongful act, it was reasonable for States to insist that that legislation, which was not per se the cause of the wrongful act, should be repealed.

35. Article 37 bis should express the idea, already present in the commentary and taken up by the Special Rapporteur in his presentation, that not all consequences of an infringement should give rise to full reparation. Only direct or proximate consequences were concerned. Perhaps, as Mr. Brownlie had suggested, account should also be taken of another element, that of intention. Article 37 bis would be the appropriate place for that element, since it would concern all the possible consequences of the internationally wrongful act.

36. Turning to article 38, he said that the fact that the article was in square brackets augured ill for the fate awaiting it. The provision might be recast in positive terms, indicating by way of example some of the legal consequences that had not been dealt with, rather than, as proposed by Mr. Pellet, attempting to cover all the consequences provided for by customary law and including a saving clause to cover anything that might have been overlooked. Perhaps a reference should be inserted somewhere in the draft articles to the consequences that were not really part of the law of State responsibility. The best place for such a reference would be, not in Part Two, but in a Part Four, next to the reference to the rules relating specifically to the consequences of some wrongful acts (*lex specialis*). In drafting article 38, the Commission had had in mind issues of the validity or termination of treaties. If a wrongful act representing a material breach of a treaty was committed, the consequences set forth in article 60 of the 1969 Vienna Convention also applied. It might be unnecessary to say so, but there was no harm in stating that the breach of a treaty obligation could have consequences that went beyond the kind of consequences pertaining to the law of State responsibility. Those were not direct consequences, in the sense that the wrongful act would not bring about the termination of a treaty, but, in those circumstances, there would be the right to terminate the treaty. It might be useful to add such a provision. Perhaps the difficult case of unlawful situations created by wrongful acts should also be mentioned. In the case of the occupation of a territory by force, there was a set of consequences that clearly belonged to State responsibility, but other consequences might arise from the fact that the occupying State, throughout the time it occupied that territory, could not be entitled to prerogatives implied by possession of a territory. He thus favoured the retention of a recast article 38, placed somewhere else in the text.

37. Mr. KAMTO welcomed the work done by the Special Rapporteur in reorganizing Part Two of the draft articles on State responsibility so as to make it more coherent and substantial. He had always had some doubts about the distinction between primary and secondary rules, a distinction that was intellectually tempting, but difficult to apply in practice. Various arguments put forward by the Special Rapporteur in his second[5] and third reports, and by some members in their oral statements, clearly showed that that distinction was sometimes invalid. That being said, as that was the plinth on which the entire drafting

[4] See 2613th meeting, footnote 3.

[5] *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4.

exercise rested, it was perhaps unnecessary to dwell unduly on the problem.

38. While agreeing with the Special Rapporteur on the need to reformulate the title of Part Two, he nevertheless wondered whether the expression "legal consequences" was appropriate, given that it did not seem to offer a fully satisfactory reflection of the content of the articles in Part Two. Perhaps it would be more appropriate to speak of legal implications; for the word "consequences" implied the full range of effects immediately attached to the wrongful act itself, whereas what underlay the treatment in Part Two was the reaction provoked by the wrongful act, or what it implied, and not the consequence in the strict legal sense as usually understood.

39. In the French text of article 36, the words *est engagée par un fait* should be replaced by the words *est engagée à raison d'un fait*, as the responsibility of a State could not arise from the act itself.

40. With regard to paragraph 2 (*b*) of article 36 bis, the need for appropriate assurances and guarantees should be retained, although that would not be possible in every case. A guarantee of non-repetition would be useful in the case of a breach committed by recourse to force, as it would reassure the party that had been the victim of the breach. The term "guarantee" was perhaps somewhat strained, for the fact that a State undertook not to repeat the action did not mean that it would be as good as its word. At any rate, from a legal standpoint, the fact that such a guarantee had been given would be an additional element. In essence, it would be a new undertaking over and above the initial undertaking that had been breached. Psychologically, it could provide the other party with additional assurances. Such a guarantee could take a number of forms. It might be a commitment made before a court or a diplomatic act of the State that had been guilty of the internationally wrongful act.

41. Paragraph 2 of article 37 bis posed a drafting problem. Full reparation perhaps eliminated the legal consequences of the internationally wrongful act, but its material or factual consequences might persist, as reparation did not in every case seek to eliminate the consequences of the act, but was sometimes intended to compensate for them. The words "eliminate the consequences" should perhaps be amended. In his view, the paragraph should perhaps adopt the classical approach of stating that reparation could be made through restitution in kind and that, if that was not possible, it must take the form of compensation or satisfaction. The final phrase, stating that the two forms of reparation could be combined, would then be appropriate. But in the current formulation, the impression given was that restitution in kind and the other forms of reparation, namely, compensation and satisfaction, were placed on the same footing.

42. Lastly, on article 38, he shared the view of members who considered that the article served a purpose. The title might be improved: the words *autres conséquences* were preferable to *conséquences diverses* because even the consequences referred to previously were included in *conséquences diverses*, an expression that might encompass what had already been covered in article 36 bis or in article 37 bis.

43. Mr. KUSUMA-ATMADJA said he agreed with Mr. Kamto that the distinction between primary rules and secondary rules was rather artificial and hard to maintain. With regard to State responsibility, he referred to the case of the nationalization of a colonial Power's estates by the former colony on gaining independence. In that case, the former colony was entitled to correct the discrimination between foreigners and natives that had been practised by the former colonial Power by rejecting the rule of prompt, effective and adequate compensation. Furthermore, what Mr. Gaja had said concerning article 38 seemed very reasonable and he welcomed his proposal that the consequences of the internationally wrongful act should be dealt with in a Part Four specially drafted for that purpose. As for article 40, it was a very difficult provision which would require special treatment and should be considered separately.

44. Mr. CRAWFORD (Special Rapporteur) said that, in order to expedite the Commission's deliberations, he would immediately respond briefly to the comments made on his third report. First, no matter how the notion of "crime" was perceived, attention had to focus on the consequences of the gravest breaches.

45. During the work of the Drafting Committee, he would carefully study Mr. Pellet's proposal that a provision on damage should be drafted as a counterpart to article 3 of Part One. That concept had to be dealt with in Part Two of the draft articles in a variety of contexts, for example, restitution and compensation, to which it was unquestionably related. The title of Part Two admittedly covered some aspects which ought to be incorporated in Part Two bis. He was pleased about the apparent agreement on the need to draw a distinction between the consequences flowing from a wrongful act and their invocation. At a later stage, it would be necessary to consider whether the provisions in question should form two separate parts or two chapters of the same part.

46. The subject of detailed provisions had been dealt with in the report in the context of compensation because that was where it arose. He would seek guidance from the Commission during the first part of the session because of the disagreement between Mr. Pellet and Mr. Brownlie on the matter. In chapter I, section B, of his report, he would propose a separate article on interest, since interest was different from compensation. As to the advisability of going into details on the quantification of compensation or the underlying principles thereof, he would also require instruction from the Commission, for that was a highly complex question entailing lengthy research and it was not unconnected with the subject of diplomatic protection.

47. Similarly, joint and several responsibility, an important issue raised by Mr. Pellet, would be dealt with in chapter III, section B, of his report.

48. On the question of assurances and guarantees of non-repetition, he had merely disentangled the issues entangled in articles 19 and 40. It was true that, in the history of responsibility, especially in the nineteenth century, there had been instances in which demands for ironclad guarantees and assurances had been made in coercive terms and enforced coercively, and that explained some

reactions. Nevertheless, there were modern examples of guarantees and assurances supplied in the form of a declaration before a court and of demands therefor submitted without coercion. He himself endorsed Mr. Gaja's position that it would be useful to clarify the notion of assurances and guarantees of non-repetition and to refer in the commentary to the question of the gravity of the breach and the risk of repetition. That was a very delicate subject because it concerned the relationship between international and internal law. Hence, in that connection, it would be wise to hold that the mere existence in internal law of legislation which might be capable in certain circumstances of producing a breach was not per se a breach of international law, provided that the text at issue could be implemented in a way consistent with international law. At a general level, that seemed to be a correct principle.

49. There seemed to be general support for the retention of article 38 in some form. It would be a matter for the Drafting Committee to decide whether it was placed in Part Two or in Part Four. Personally, he would prefer the second option and a recasting of the provision.

50. He agreed with Mr. Brownlie that the application of the concept of "remote damage" depended on the particular legal context, but it also depended on the facts themselves. The Commission should not get lost in details and it might be better to avoid retaining classical formulas based on an analogy with internal law. Was restitution an optional remedy? Article 37 bis was neutral on the choice between restitution and compensation, whereas article 43, as it stood, established restitution as the primary remedy. He would return to that question when dealing with article 43. He was grateful to Mr. Brownlie for the argument he had set out for maintaining the notion of cessation in the draft articles. He was pleased that that position had been generally accepted. Furthermore, like Mr. Brownlie, he considered that the notion was not exclusively linked to that of a continuing wrongful act, since there could be a pattern of individual breaches not itself separately classified as a wrongful act, but which nonetheless called for cessation and, possibly, for assurances and guarantees. The Drafting Committee should examine that point.

51. Mr. Pellet and Mr. Simma were uncertain about reflexivity, a matter requiring further consideration in the Drafting Committee, which would have to decide on the retention or deletion of certain provisions. Moreover, he agreed with Mr. Simma that the Commission should review the limitation referred to in article 42, paragraph 3, when it studied countermeasures.

52. He noted that Mr. Gaja was in agreement with the need to pursue reflection on the topic of directness or proximity in the context of article 37 bis. His comments on the location of article 38 deserved consideration.

53. In his own opinion, the Commission was more concerned with cessation and reparation than with underlying issues like the validity of legal acts. Although that subject was a question of legal effects, it raised problems of its own.

54. He subscribed to most of Mr. Kamto's drafting comments. The distinction between primary and secondary rules should not be abandoned, although the application of many secondary rules would be affected by primary rules.

55. Mr. PELLET asked the Special Rapporteur to cite examples of cases in which the courts had given assurances and guarantees of non-repetition. He did not see any, apart from a vague kind of judicial guarantee of non-repetition by which ICJ had specified, in its judgment in the *Nuclear Tests* case (*New Zealand* v. *France*), that the applicant could request an examination of the situation if the situation had changed. But that was not a problem of responsibility. In that case, the Court had not found France guilty of committing an internationally wrongful act and its conclusion did not really seem to be a guarantee of non-repetition. He was not convinced by Mr. Simma's example either: he did not have the impression that the appeals body in question had given the slightest guarantee of non-repetition. He was in favour of the progressive development of international law, but it was necessary to decide in which direction to point it.

56. Concerning the question of restitution, he agreed a priori with the Special Rapporteur that the problem should be considered in connection with article 43. In that context, he disagreed with Mr. Brownlie: once the principle established in the judgment in the *Chorzów Factory* case was accepted, it was only logical to give priority to *restitutio in integrum*. The purpose of reparation was to do away as much as possible with the consequences of the internationally wrongful act. If that principle was not applied first, States, and rich States in particular, would be able to commit an internationally wrongful act. That was unacceptable: *restitutio in integrum* must be the primary form of reparation. Restitution was the rule.

57. He was troubled by the references which Mr. Brownlie and Mr. Kusuma-Atmadja had made to nationalizations. That question had nothing to do with the problem of responsibility. In international law, nationalization was a lawful act and the right to nationalize was subject to a number of conditions, including the obligation to pay compensation and not to discriminate. It was only when a State failed to comply with those obligations that it committed an internationally wrongful act entailing its responsibility. Compensation for nationalization was not compensation for an internationally wrongful act.

58. With regard to the direct nature of the damage, he pointed out that the chain of causality, or "transitivity", must be direct and uninterrupted, whereas the cause might not be immediate. He was not certain whether the word "proximity" should be used in connection with causality. A whole series of events could take place between an internationally wrongful act and the damage and the chain of "transitivity" was such that the damage was reparable on the basis of responsibility for a breach, i.e. for a wrongful act. That idea should be reflected in an article rather than in the commentary.

59. Mr. SIMMA said he concluded from the discussion that assurances and guarantees of non-repetition should be a function of two parameters: the seriousness of the breach and the probability of repetition. He could not see that the seriousness of a breach was a factor calling for

assurances and guarantees to a greater degree than in other cases. What was important, for example, in the case of the illegal occupation of a territory, would be a declaration by a court that such an occupation was illegal. Assurances and guarantees of non-repetition were also needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent. In such a case, it made perfect sense for an international court to declare that certain assurances and guarantees of non-repetition were to be given, without necessarily going so far as to call for the repeal of the legislation at issue.

60. Mr. CRAWFORD (Special Rapporteur) said that he did not really have in mind any example of a court decision concerning the granting of assurances and guarantees of non-repetition. In State practice, however, such assurances and guarantees were frequently given, for example, by the sending State to the receiving State concerning the security of diplomatic premises.

61. Mr. TOMKA pointed out that guarantees of non-repetition did not exist only in judicial practice. Some authors had considered that certain measures contained in peace treaties signed after the Second World War contained guarantees of non-repetition.

62. Mr. KAMTO said that, although guarantees of non-repetition could be regarded as part of the progressive development of international law, they were nonetheless useful. It must be asked, however, who gave the guarantees: was it the court before which the case had been brought or the State which had been guilty of the internationally wrongful act? On the basis of the discussion, he had the impression that it was the court which had to give such guarantees, but, in fact, it was the State that had to do so. The question then arose whether the State must give the guarantees before the court, during the proceedings, or outside the proceedings. Both alternatives were conceivable. Returning to the example of the violation of international law through use of force, to which he had referred earlier, he said that it was in such an instance that guarantees of non-repetition were most necessary. They could be given in the form of a declaration before the court, and might or might not be included in the court's ruling, or in the form of a diplomatic declaration, which would not necessarily be made during the proceedings. In either case, guarantees of non-repetition were only an undertaking in addition to the one initially violated by the State concerned. When a State was asked to put a stop to its wrongful conduct, it was actually being asked to comply with its international undertaking or, in other words, to give a guarantee of non-repetition. The legal effect of guarantees of non-repetition was thus basically only psychological. Except in a few cases, materially speaking, there was no definite guarantee that the State would not violate its commitment in the future. He gave as an example the case of State A, that had on its territory a military training camp situated near its border with State B. If nationals of State A or foreigners in training in that camp crossed the border from time to time to commit crimes or take military action in the territory of State B, the international responsibility of State A could be invoked. By taking measures to stop such acts, State A put an end to an internationally wrongful act attributable to it. However, it could also have given guarantees of non-repetition consisting, for instance, of a commitment to dismantle the military training camp or move it away from the border in question. A provision on guarantees of non-repetition certainly had a place in the draft articles under consideration.

63. Mr. GAJA (Chairman of the Drafting Committee) announced that the Drafting Committee on the topic of "State responsibility" was composed of the following members: Mr. Crawford (Special Rapporteur), Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Pellet, Mr. Rosenstock and Mr. Rodríguez Cedeño as ex officio member.

The meeting rose at 1.05 p.m.

2615th MEETING

Thursday, 4 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that he would concentrate on the most salient issues addressed in the third report (A/CN.4/507 and Add.1–4) before turning to draft articles 36 to 38. He reserved his position on articles 40 and 40 bis.

2. He supported most of the views expressed by the Special Rapporteur in the report. For example, paragraph 6 clearly demonstrated the linkage between the form of the draft articles and the peaceful settlement of

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).